BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY M. McINTOSH	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,500
CITY OF WICHITA	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the July 17, 2001, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to prove by a preponderance of the evidence that he sustained accidental injury arising out of and in the course of his employment with respondent on the dates alleged. That is the only issue before the Board for consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, a firefighter with the City of Wichita for 30 years, fell on April 4, 2001, while playing tennis with other members of the fire department, breaking his right arm. This accident resulted in surgery on his right arm and elbow on April 5, 2001.

Claimant worked a 24-hour-on/48-hour-off shift with respondent fire department. The fire department had a specific physical education requirement and a specified physical education period from 8:00 a.m. to 9:00 a.m. Claimant regularly ate supper with the fire department at approximately 5:00 p.m. After 6:00 p.m., the department had what they called discretionary time when the firefighters could do whatever they desired, so long as they remained in contact with the station should a call come in. Claimant and several other firefighters one to two days a week would go to a local tennis court and play tennis. This tennis activity was purely on a volunteer basis and was not, in any way, required by the City of Wichita or the City of Wichita Fire Department.

When claimant suffered the injury, he went to St. Joseph Medical Center and received the initial treatment in the emergency room. He advised them that this was to be billed to his personal health and accidental injury insurance, as any injuries suffered while

playing tennis were, as acknowledged by claimant, "the personal responsibility of the firefighter."

Claimant contends that the physical fitness activity of playing tennis was part and parcel of his required physical fitness activity in order to meet the department's physical fitness policy. Respondent contends the tennis playing was a voluntary activity, performed during discretionary time and did not rise out of claimant's employment with respondent.

The City of Wichita Fire Department had a specific physical fitness policy. This administrative policy, placed into evidence at the time of preliminary hearing, designated a specific physical fitness exercise period from 8:00 a.m. to 9:00 a.m., with all personnel required to be in uniform by 9:30 a.m. After 6:00 p.m., the department had what they called discretionary time, and the firefighters could either watch television or participate in other activities as they so chose.

The administrative physical fitness policy included cardiovascular exercises, weight training, walking, running and biking activities, and cool-down periods. The administrative physical fitness policy did not discuss the playing of tennis. Claimant acknowledged the tennis playing was a voluntary activity, although he did testify that the activity was performed at least, in part, to help keep physically fit, as was required of all firefighters.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 44-508(f) states, in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social activities under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

Larson's Workers' Compensation Law, § 22.01, p. 22-2 (2000), lists three factors to determine whether recreational and social activities fall within the course of an employee's employment.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment. On several occasions, firefighters have been injured while playing volleyball during their work shifts. Courts have found these activities to be regular

incidents and conditions of employment, where volleyball is a recognized activity at the fire department and participation by any employee was acquiesced in by their supervisors. In Flower v. City of Junction City, WCAB Docket No. 189,684 (February 1998), the Appeals Board was asked to consider whether the claimant, a firefighter for the City of Junction City, suffered accidental injury arising out of his employment when he was injured playing volleyball. In Flower, the City of Junction City had a daily schedule, including an entry at 1300 hours for "physical fitness". Claimant's injury occurred during the scheduled physical fitness period. In addition, claimant testified he had been discussing a personal problem with the acting captain, which related to one of the firefighters' attitudes at work. He decided to use the volleyball game as an opportunity to talk to that particular firefighter about the ongoing problems.

In this instance, the activity occurred while claimant was involved in a discretionary period activity, which did not take place during the normally scheduled physical fitness period.

A second factor listed by Larson's in determining whether a recreational activity is within the course of employment is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. The Board acknowledges that allowing employees to engage in physical fitness activities benefits the department by having firefighters better prepared to respond to emergency situations which require both physical fitness and stamina. However, in this instance, again the department had set aside a specific physical fitness period. In addition, the department had, in effect, a physical fitness activity policy which specified the types of activities the department recommended for physical fitness training. Tennis was not included in that physical fitness administrative policy.

A final factor in determining whether recreational activities are within the course of employment is whether they occur on the employer's premises during a lunch or recreation period as a regular incident of the employment. According to Larson's, "recreational injuries during the noon hour on the premises have been held compensable in the majority of cases." Larson's, at § 22.03, p. 22-5 (2000). In this instance, claimant was on duty, but was injured while playing tennis away from his employer's premises at a time other than a regularly scheduled time for physical fitness activities. Claimant was instead injured during the department's discretionary time, when the firefighters are free to "do their own thing."

Finally, claimant acknowledged during cross-examination that he knew that tennis was not considered to be within the physical fitness policy and that injuries occurring during this discretionary time while playing tennis would be "the personal responsibility of the firefighter."

The Appeals Board finds, therefore, that claimant's injuries suffered while playing tennis during the discretionary time away from the department premises did not constitute accidental injuries occurring out of his employment with respondent. The Order of the Administrative Law Judge denying claimant benefits would, therefore, be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes, dated July 17, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2001.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director